Petition

81-579

No.

Office-Supreme Court,
FILED
SEP 22 1981
ALEXANDER L. STEVA
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

CONCORD INSTRUMENTS CORPORATION,
Petitioner,

v.

PENSION BENEFIT GUARANTY CORPORATION,

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW),
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals for the Sixth Circuit

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QUESTIONS PRESENTED

(1) Since 29 U.S.C. § 1321(b)(5) exempts from Title IV of the Employee Retirement Security Act of 1974 ("ERISA") all pension plans which have not "at any time after September 2, 1974, provided for employer contributions," did the Court of Appeals err in applying Title IV to a plan which did not impose any obligation on the employer to make contributions after August 1974?

(2) Did the Court of Appeals err in concluding that 29 U.S.C. § 1321(b)(5) exempts only union plans funded by union members' contributions and that it does not apply to any plan funded in whole or in part at any time by employer contributions?

(3) Since 29 U.S.C. § 1322(a) restricts plan termination insurance under Title IV to plan benefits which are "nonforfeitable" "under the terms of a plan," did the Court of Appeals err, and disregard this Court's controlling ERISA decisions, by treating all possible benefits under a plan as "nonforfeitable" when the plan at issue explicitly limited the employees' benefits and rights to benefits to the amount of assets held by the plan's trustee?

(4) Does the Due Process Clause of the Fifth Amendment authorize the imposition of employer liability under Title IV of ERISA when there is no ongoing relationship between the employer and its former employees on or after the effective date of ERISA?

STATEMENT OF INTERESTED PARTIES

This petition is being filed on behalf of Concord Instruments Corporation, the successor by change of corporate name to Concord Control, Inc., which was the interested party in the courts below. In addition to the parties listed in the caption, the following were parties below:

(a) The Central Trust Co., N.A., of Cincinnati, Ohio, trustee of the pension plan's assets;

(b) F. O. Leurck, Melvin E. Remley, Jack G. Flohr and Richard A. Vogele, present or former members of the pension plan's Board of Administration; and

(c) Local 1258 of the respondent International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (collectively referred to as the "UAW").

Concord Instruments Corporation has no parents, affiliates, or subsidiaries which are not wholly-owned.

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Respondents.

PETITION FOR WRIT OF CERTIORARI To the United States Court of Appeals for the Sixth Circuit

Concord Instruments Corporation, as successor through a corporate name-change to Concord Control, Inc. (hereinafter "Concord"), plaintiff in the action below (which was a consolidation of two actions), respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit filed on May 6, 1981.

OPINIONS BELOW

The opinion of the Court of Appeals, filed on May 6, 1981, is reported at 647 F.2d 701 and reproduced in Appendix A. The findings of fact and conclusions of law of the United States District Court for the Southern District of Ohio are unreported; they are reproduced in Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on May 6, 1981. Copies of the judgment and the order denying a timely petition for rehearing are reproduced in Appendix C. This petition was filed within 90 days of June 24, 1981. The jurisdiction of this Court is founded upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

This case involves the construction and constitutionality of the following sections of ERISA:

Section 4021(b)(5), 29 U.S.C. § 1321(b)(5):

> "(b) This section does not apply to any plan—
>
> * * *
>
> "(5) which has not at any time after September 2, 1974, provided for employer contributions."

Section 4022(a), 29 U.S.C. § 1322(a):

> "(a) Subject to the limitations contained in subsection (b) of this section, the corporation shall guarantee, in accordance with this section, the payment of all nonforfeitable benefits (other than benefits becoming nonforfeitable solely on account of the termination of a plan) under a single-employer plan which terminates at a time when section 1321 of this title applies to it."

Section 4062(b), 29 U.S.C. § 1362(b):

> "(b) Any employer to which this section applies shall be liable to the corporation, in an amount equal to the lesser of—
>
> "(1) the excess of—

> "(A) the current value of the plan's benefits guaranteed under this subchapter on the date of termination over
>
> "(B) the current value of the plan's assets allocable to such benefits on the date of termination, or
>
> "(2) 30 percent of the net worth of the employer determined as of a day, chosen by the corporation but not more than 120 days prior to the date of termination, computed without regard to any liability under this section."

The applicable constitutional provision is the due process clause of U.S. Const. amend. V:

> "No person shall be . . . deprived of life, liberty or property, without due process of law . . ."

STATEMENT OF THE CASE

In 1956 the K-D Lamp Company (now a division of Concord) entered into a pension agreement with the UAW. This case involves a pension plan (the "Plan") created pursuant to this pension agreement (hereinafter, as restated between the UAW and Concord as of January 1, 1972, the "Pension Agreement") and a collective bargaining agreement ("Collective Bargaining Agreement").

The key facts in this case are a sequence of dates and certain terms in the Plan. The dates are easily stated. An understanding of the pertinent provisions of the Plan requires a somewhat more detailed exposition.

The Crucial Dates

The Collective Bargaining Agreement and the Pension Agreement expired on August 7 and 8, 1974, respectively, as a result of notices sent by the UAW (App. B, at pp. A-15 - A-16). In fact, on August 8, 1974, the UAW called and conducted an

economic strike against Concord (*id.*), and union and management have never reached another agreement. Concord has not made any contributions whatsoever to the Plan for hours worked after August 8, 1974. Notwithstanding this effecti[illegible] cessation of pension-related activity before the September 2, 1974, effective date of Title IV of ERISA, this case arises from the effort of the Pension Benefit Guaranty Corporation ("PBGC") to assert jurisdiction over the Plan and ultimately to collect an amount which it estimates to be more than $800,000 from Concord in connection with the technical continuation of the Plan until its official termination on April 1, 1975 (*see* App. A, at p. A-3).

The Crucial Terms Of The Plan

But for the nominal continuation of the Plan until April 1, 1975, this case would never have arisen. That continuation stemmed from Article XII, Section 3 of the Pension Agreement, which provided that the Plan would survive a [illegible]rmination of the Pension Agreement and would exist until fo[illegible]nally terminated by Concord. The district court properly relied on this severability provision to hold that the funding mechanisms for the Plan were contained only in the Pension Agreement and not in the severable Plan itself (App. B, at p. A-15). The Court of Appeals agreed:

> "On August 7, 1974, the pension agreement expired. *The funding provisions of the Plan expired with it*" (App. A, at p. A-3) (emphasis added here and elsewhere unless otherwise noted).

Article II, Section 1 of the Pension Agreement dealt with funding for the Plan. It stated: "The Company . . . shall pay to the Trustee, for the purpose of the Retirement Fund, for each hour worked for the Company by each employee . . ." specified cents-per-hour-worked. The Collective Bargaining Agreement and the Pension Agreement were inextricably linked in this regard because Article I, Section 2 of the Pension Agreement defined the word "employee" as used therein to mean:

> "[A]ny person who, at the time referred to in the context in which the said term is used, is on the seniority list of the Company in the bargaining unit as defined in the collective bargaining agreement then in effect between the Company and the Union" (App. B, at p. A-16).

Since there was no pension agreement after August 7, no collective bargaining agreement "then in effect" after August 8, and no hours worked by "employees" after August 8, both courts below recognized that the contractual funding provisions died in August 1974 and that there was no requirement for employer contributions at any time after the adoption of ERISA. Indeed, it was not *possible* for Concord to make any contributions after August 8, 1974, because there were no covered "employees." Nevertheless, the Court of Appeals concluded that these defunct provisions arose like Lazarus on September 2, 1974, to "provide for" employer contributions attributable to non-existent hours worked by non-existent employees. *See* App. A, at p. A-6.

The Pension Agreement and the Plan were replete with provisions which limited the employer's liability under the Plan. Restrictions on the employer's duty to make contributions, including a disclaimer of employer liability upon termination, were found in Article II, Section 1 and Article XIII of the Plan. These provisions were very similar to those before the Court in *Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, 446 U.S. 359 (1980).[1] The Concord Plan, however, contained very significant additional provisions not present in the Nachman plan. These provisions limited the employees' right or entitlement to benefits as part of the very definition of those benefits.

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[1] Article XII, Section 3 of the Pension Agreement provided that in the event of termination of the Pension Agreement, no action by Concord would "adversely affect any benefits otherwise payable to retired employees, non-retired employees or former employees *to the extent the assets of the Fund* are sufficient to provide such benefits at the time of such action . . . ." No such provision was discussed in *Nachman*.

The first paragraph of Article VI, entitled "Retirement Benefits," stated, *"Every retired and disabled employee* who has been determined by the Board to be eligible for retirement benefits, subject to the terms and conditions of the Plan, *shall be entitled to receive the benefits provided for hereunder or his proportionate share thereof, to the extent that funds are available under the Plan."* It further provided: "*Within the funds available, the following benefits are provided for retired and disabled employees* . . . ." Article VIII, Section 1, dealing with lump sum benefits, stated, "Notwithstanding anything hereinbefore set forth, lump sum benefit *shall be paid only to the extent that funds are available therefor under the Plan.*" Article IX dealt with the death benefits, and both Section 1 and Section 2 thereof provided that the respective benefits "shall be paid *only to the extent that funds are available therefor under the Plan.*"

These were restrictions incorporated into the definition of the Plan's benefits, above and beyond the employer liability disclaimer clauses and schedules for allocation of assets considered in *Nachman*. The limitation of employee rights as an integral part of the rights created against the Plan was summarized by Article XV, Section 2 of the Plan, which stated:

> "No employee, retired employee or disabled employee or his beneficiary has any interest, direct or indirect, in the Retirement Fund other than has been expressly provided for in this Agreement."

THE BASIS OF FEDERAL JURISDICTION

Concord invoked the jurisdiction of the district court under 28 U.S.C. §§ 1331, 2201 and 2202 and under 29 U.S.C. § 1303(f). The jurisdictional basis of the PBGC case which was consolidated with Concord's prior filing was 29 U.S.C. § 1303(e).

REASONS FOR GRANTING THE WRIT

By ignoring the adjudicated facts and dealing with this case in an abstract or generalized fashion, the Sixth Circuit has created an irreconcilable conflict with the language and legislative history of ERISA and with the opinions of this Court. It has needlessly called into question the meaning and validity of a regulation issued by the Department of the Treasury. The issues raised are important questions of law with implications for many pension plans. The opinion of the Sixth Circuit jeopardizes the orderly administration of all plans and the financial health of all employers who have relied on the pronouncements of this Court and on the language of the Treasury Regulation.

The Court of Appeals misconstrued and misapplied 29 U.S.C. § 1321(b)(5) by disregarding its *explicit* language and legislative history and erroneously relying on the legislative history of another provision of ERISA. This error extends the scope of Title IV of ERISA to all pension plans in existence on September 2, 1974, which were *ever* funded by an employer, even if those plans, like the Concord Plan, did not then or thereafter contain any provision which permitted (much less required) employer contributions. The Sixth Circuit decision potentially extends Title IV coverage to all pre-ERISA plans to which employers contributed even if those plans were "frozen" — *i.e.*, contributions were discontinued — long before the enactment of ERISA, but were never technically "terminated." Indeed, it could be construed as extending Title IV to include plans which were *never* funded by employer contributions if those plans were not both maintained by unions *and* funded solely by *union* members.

Second, the Sixth Circuit decision conflicts with *Nachman Corp.* v. *Pension Benefit Guaranty Corporation*, 446 U.S. 359 (1980), and *Alessi* v. *Raybestos-Manhattan, Inc.*, ___ U.S. ____, 68 L.Ed. 2d 402 (1981) (decided twelve days after the

decision below). It negates that part of 29 U.S.C. § 1322(a) which restricts PBGC jurisdiction to those benefits which are "nonforfeitable" "*under a single-employer plan*" and threatens to sweep *all* benefits of *every* defined benefit plan into the jurisdiction of the PBGC. Congress did not intend, and this Court should not countenance, this result.

Third, the Court of Appeals authorized an unconstitutional deprivation of property by subjecting Concord to the application of Title IV of ERISA.

1. The Sixth Circuit Misinterpreted Section 1321(b)(5).

Section 1321(b)(5) provides in simple and straightforward English that Title IV of ERISA does not apply to a plan "which has not at any time after September 2, 1974, provided for employer contributions." The Court of Appeals has rewritten this provision so that: (a) it exempts only union pension plans funded during their entire existence (before and after the enactment of ERISA) exclusively by *union* members' contributions; and (b) it does not apply to any plan ever funded, in whole or in part, in the past or at present, by employers' contributions. The keystone of the court's interpretation appears at page A-6 of Appendix A:

> "Although the legislative history of ERISA does not specifically address the exemption found at 29 U.S.C. § 1321(b)(5), it does discuss an identical exemption from ERISA's minimum funding rules. 29 U.S.C. § 1081(a)(5). The legislative history explains 'plans which have not provided for employer contributions at any time after the date of enactment are to be exempt from the minimum funding rules (i.e., plans of unions funded exclusively by contributions of union members).' [citation omitted]"

This conclusion is patently wrong for three reasons.[2] Common sense and the English language compel the conclusion that § 1321(b)(5) actually exempts plans which before the enactment of ERISA provided for employer as well as employee contributions, as long as those plans did not provide for employer contributions after September 2, 1974.

1. The Sixth Circuit's reliance on legislative history violates the rule that a court will not refer to legislative history where a statute is clear on its face. *United States* v. *Oregon*, 366 U.S. 643, 648 (1961); *Hill* v. *Tennessee Valley Authority*, 549 F.2d 1064 (6th Cir. 1977), *aff'd*, 437 U.S. 153 (1978).

2. Contrary to the Sixth Circuit's statement, there is legislative history to § 1321(b) which expressly sustains Concord's construction of that section. H. Conf. Rep. 93-1280, 93d Cong., 2d Sess. 367-68, *reprinted in* [1974] U.S. Code Cong. & Ad. News 5038, 5147, states:

"Plans specifically excluded from coverage are:

* * *

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[2]The Sixth Circuit appears to have based its decision on an independent analysis of the issue. If the Sixth Circuit's decision were viewed as being based on any "deference" to the PBGC, it would be still further flawed. An administrative determination cannot supplant an *independent* judicial decision on an issue of statutory construction which defines the limits of the agency's own jurisdiction. *E.g.*, *SEC* v. *Sloan*, 436 U.S. 103, 118 (1978); *Barlow* v. *Collins*, 397 U.S. 159, 166 (1970); *Social Security Board* v. *Nierotko*, 327 U.S. 358, 369 (1946). In *Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, *supra*, this Court recognized that it should consider the PBGC's views on the meaning of ERISA, but the Court engaged in its own analysis of the statute and declined the agency's demand that it rest its decision on any notion of "deference." Any claim to deference with respect to §1321(b)(5) is further attenuated because: (a) the PBGC has a vested financial interest in increasing its assets by expanding its jurisdiction; and (b) there is no formal PBGC determination in the form of a regulation interpreting this statutory provision.

"(4) plans established by fraternal societies or other organizations described in section 501(c)(8), (9), or (18) of the Internal Revenue Code which receive no employer contributions and which cover only members (not employees),

"(5) a plan that has not after the date of enactment provided for employer contributions,

* * *

"(12) a plan established and maintained by a labor organization described in section 501(c)(5) of the Internal Revenue Code that does not after the date of enactment provide for employer contributions . . . ."

This discussion shows that exemption (5) of § 1321(b) was intended to correspond precisely to the literal meaning of the language used: the provision exempts all plans (union or non-union) which have not provided for employer contributions after September 2, 1974. The Sixth Circuit's construction eliminates § 1321(b)(5) from the statute and exemption (5) from the legislative history by holding that this exemption merely covers labor union plans and thus has the same meaning and function as the other exemptions discussed in paragraphs (4) and (12) of the legislative history.

3. Analogies to other sections of ERISA do not support a limited construction of § 1321(b)(5). The Court of Appeals did not fully analyze ERISA and accordingly overlooked subtle distinctions created by Congress in defining the exceptions from vesting (§ 1051), funding (§ 1081(a)), and plan termination insurance coverage (§ 1321(b)). A comparison of these exemptions confirms that : (a) Congress did not intend to limit the meaning of § 1321(b)(5) to plans to which employees contributed (much less to union-only plans); and (b) the function of § 1321(b)(5) is the exemption of all plans which do not provide for employer contributions after September 2, 1974, without regard to the identity of the contributor before September 2, 1974.

The Sixth Circuit's decision limits § 1321(b)(5) to the same meaning as §§ 1051(3) and 1051(4) even though: (a) the § 1321(b)(5) language is different; and (b) the § 1321(b) legislative history at paragraphs (4) and (12), quoted above, discusses the exemptions that correspond to the § 1051 provisions.[3] The Sixth Circuit's reliance on the legislative history to § 1081(a)(5) is misplaced because that history is different than the history of § 1321(b)(5); the latter history does not contain the parenthetical phrase emphasized by the Sixth Circuit[4] and has a paragraph (12) for which there is no independent equivalent in the § 1081(a)(5) history.

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[3]The pertinent parts of § 1051 apply to:

> "(3) (A) a plan established and maintained by a society, order, or association described in section 501(c)(8) or (9) of Title 26, if no part of the contributions to or under such plan are made by employers of participants in such plan, or
>
> "(B) a trust described in section 501(c)(18) of Title 26;
>
> "(4) a plan which is established and maintained by a labor organization described in section 501(c)(5) of Title 26 and which does not at any time after September 2, 1974, provide for employer contributions."

Plans described in § 1051(3) are exempted from Title IV by § 1321(b)(4). IRC Section 501(c)(5) plans described in § 1051(4) will almost automatically also qualify for § 1321(b)(4) exemption because their sponsors generally qualify for federal income tax exemption under IRC Section 501(c)(9). *See* Rev. Rul. 62-17, 1962-1 Cum. Bull. 87. For this reason, paragraph 12 of the Section 1321(b) legislative history construes the statute as exempting such plans despite the absence of an express statutory provision.

[4]It should be noted that the Sixth Circuit's reading of this parenthetical as a restriction on the plain meaning of § 1081(a)(5) is highly questionable. The parenthetical reference to union-sponsored plans was probably either an attempt to harmonize § 1081(a)(5) with § 1051(4), which is expressly limited to plans maintained by labor

(footnote continued on next page)

II. The Sixth Circuit Misconstrued And Misapplied This Court's ERISA Decisions.

This Court has decided two previous ERISA cases. *Nachman Corp.* v. *Pension Benefit Guaranty Corp., supra; Alessi* v. *Raybestos - Manhattan, Inc.*, ____ U.S. ____, 68 L.Ed.2d 402 (1981). By failing to focus on the specifics of the Concord Plan, the Sixth Circuit misapplied both these decisions and contravened the clear message of this Court.

In *Alessi,* the Court reaffirmed that ERISA leaves the question of which benefits are "nonforfeitable" "to the private parties creating the plan." 68 L.Ed. 2d at 409. The plan before the Court in *Nachman* contained only a "typical disclaimer of employer liability for any deficiency in the assets of the fund" and a "schedule for the distribution of benefits upon termination," as opposed to restrictive provisions which were "part of the plan's definition of benefits." 446 U.S. at 365 n.8. The majority in *Nachman* faced a forceful dissent by four justices whose basic conclusion—perhaps based in part on the *amicus* brief filed by Concord—was that the Nachman plan did not provide "nonforfeitable" benefits because it limited what it promised to its participants as well as limiting employer liability. *See* 446 U.S. at 392 (Stewart, J., dissenting). The majority opinion rejected Justice Stewart's interpretation of the Nachman plan but apparently accepted the conclusion that a plan which

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organizations, or the result of the Conference Committee's confusion between those two provisions. But even if the Sixth Circuit has correctly read § 1081(a)(5), it is quite plausible that Congress intended a different meaning for similar statutory language in § 1321(b)(5). In *Nachman Corp.* v. *Pension Benefit Guaranty Corp., supra,* 446 U.S. at 370 n.14, this Court noted that terms in ERISA can have different meanings in the various titles of this "comprehensive and reticulated" statute. *Nachman* discusses one example of a difference between Titles I and IV. Any distinction between §§ 1081(a)(5) and 1321(b)(5) would simply be a second example.

did limit an employee's right to benefits did not provide "nonforfeitable" benefits. *See* 446 U.S. at 369 & 373-74 n.19.[5]

A careful reading of the various opinions in *Nachman* therefore establishes that the Concord Plan, which restricted an employee's right or claim to the amount of benefits for which there were assets in the Plan, did not provide "nonforfeitable" benefits and was not subject to Title IV of ERISA. The provisions of Articles VI, VIII, IX and XV of the Plan, previously quoted, all protected the Plan and its trust—*not* the employer. They limited the rights of employees and the obligations of the *Plan*—not the liability of the employer. They incorporated and restated the restriction limiting benefits to those for which there were sufficient assets as part of the very definition of benefits—not merely as part of the procedure for termination.

Nachman also establishes that the Concord Plan did not provide "nonforfeitable" benefits because *Nachman* indicates that ERISA should be interpreted in accordance with a Treasury Department Regulation, 26 C.F.R. § 1.411(a)-4(a)(1980), which provides in pertinent part: "Rights which are conditioned upon a sufficiency of plan assets in the event of a termination or partial termination are considered to be forfeitable because of such condition."[6] This regulation was inapplicable in *Nachman* because the Court perceived the Nachman plan as containing only an employer liability clause. 446 U.S. at 373-74 n.19. But

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[5]The Court also placed heavy reliance on the evidence that pre-ERISA pension plans ordinarily contained employer liability disclaimer provisions and that an interpretation of ERISA which removed coverage because of such provisions would therefore greatly reduce the utility of the statute. 446 U.S. at 378-81. There was no evidence in *Nachman* or in this case that pre-ERISA plans "ordinarily" contained restrictive definitions of benefits comparable to those in the Concord Plan.

[6]*Alessi* endorsed another aspect of the same regulation. *See* 68 L.Ed. 2d at 413-15.

since the Concord Plan went beyond the Nachman plan and conditioned employees' very *rights* to benefits upon the amount of plan assets, under *Nachman* the Treasury Regulation should be applied. Under that Regulation the rights of participants in the Concord Plan were "forfeitable." The Court of Appeals' opinion has created considerable confusion as to the validity and application of the Treasury Department Regulation.

III. The Sixth Circuit Imposed A Unique And Unconstitutional Burden On Concord.

The Sixth Circuit's treatment of the constitutionality of ERISA *as applied to Concord* suffers from the same fatal flaw of failing to focus on the facts of *this* case. Application of Title IV of ERISA to Concord would be a markedly different application than was present in *Nachman* and would be clearly unconstitutional.

Unlike the employer in *Nachman,* Concord did not terminate an ongoing plan as part of a unilateral business decision to close a plant. It was the *union—not Concord*—which terminated the Collective Bargaining and Pension Agreements in August 1974. At that time, Concord had no real opportunity to avoid ERISA by terminating the Plan before the statute became effective. In the context of active labor negotiations such action might have been viewed as an unfair labor practice.[7]

Unlike the employer in *Nachman,* Concord derived no income or other *quid pro quo* from the nominal continuation of the Plan. It received neither any work nor any benefit from the employees covered by the Plan between August 1974 (before the enactment of ERISA) and the Plan's termination. As a result of the strike and the inability of the union to reach any new agreement with Concord, throughout this period the lame-duck Plan was the only semblance of any relationship between Concord and its *former* workers.

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[7]Indeed, the union filed an unfair labor practice charge making precisely this claim. The claim was, of course, rejected because the Plan had not in fact been formally terminated at that time.

The due process problem created by the application of Title IV to Concord is thus extraordinary. There is no "proven scope" of this problem, much less legislative history focusing on this situation as a general and widespread problem for which termination insurance was an appropriate solution. Liability to the PBGC does *not* represent a cost for which the employer received any benefit (much less full benefit) because Concord received no work from the covered employees during the last eight months of the Plan. And excluding the Concord Plan from Title IV would not reward a termination which was made specifically to avoid conferring the protection of ERISA upon employees because the union, not Concord, precipitated the termination of Concord's obligation to contribute to the Plan and, ultimately, the Plan's termination.

These circumstances therefore fall squarely under *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 236 (1978), which invalidated a state pension reform act; *W.B. Worthen Co.* v. *Kavanaugh*, 295 U.S. 56 (1935), which voided a law that negated the only aspect of a contract having any value; and that part of *Railroad Retirement Board* v. *Alton Railroad Co.*, 295 U.S. 330 (1935), which *unanimously* struck down a statutory provision requiring employers to bear the cost of pensions for employees who had ceased service before passage of the statute.

CONCLUSION

For the reasons stated, a Writ of Certiorari should issue to review the judgment of the Court of Appeals in this case.

Respectfully submitted,

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September, 1981

APPENDIX

APPENDIX A

Nos. 78-3252, 78-3253 and 78-3254

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Concord Control, Inc.,
Plaintiff-Appellee,

v.

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW),
Intervenor-Defendant-Appellant,

and

Pension Benefit Guaranty Corporation,
Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of Ohio, Western Division.

Decided and Filed May 6, 1981.

Before: MERRITT, BROWN and JONES, Circuit Judges.

JONES, Circuit Judge. Concord Control, Inc. (Concord Control) filed this action to obtain a declaratory judgment that the Pension Plan (Plan) for the employees of the K-D Lamp Company was not covered by the plan termination insurance program established by Title IV of the Employee Retirement Income Security Act of 1974 (ERISA). The district court held that the Plan was not covered because it did not "provide for" employer contributions to the Plan after the enactment of ERISA. 29 U.S.C. § 1321(b)(5). We reverse.

I.

In 1956, the K-D Lamp Company and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) entered into a pension agreement; the Plan was established pursuant to the agreement. A trust was created to hold the Plan's assets. The obligation for past service credit was greater than the trust's assets, but the Company's payments were intended to gradually reduce the asset insufficiency. In 1966, Concord Control took over the K-D Lamp Company and it has been operated as a division of Concord Control since that time.

In 1972, Concord Control and the UAW signed a new pension agreement governing the employees at the K-D Lamp Company. The agreement amended the Plan and restated its terms. The agreement and the Plan are both included in a single document; a separate collective bargaining agreement contains the non-pension terms of employment.

As amended and restated in 1972, the Plan provides for monthly retirement benefits for participating employees. The benefits are determined by multiplying a participant's years of credited service with the Company by the fixed dollar amounts set out in the Plan. The Plan also provides for lump sum benefits in lieu of monthly retirement benefits.

The Plan's benefits are funded by employer contributions. Article II, section 1 of the Plan provides for the employer to pay a specific amount into the trust for each hour worked by a participating employee. This amount increased by specific increments during the life of the agreement: from 29 cents per hour worked in June 1971, to 41 cents per hour worked in December 1973. The agreement also recited that "no employees shall make or be required to make any payment to the retirement fund . . ."

On August 7, 1974, the pension agreement expired. The funding provisions of the Plan expired with it. The UAW and Concord Control began negotiating a new collective bargaining agreement and pension agreement several months before the agreement expired, but the negotiations were unsuccessful.

The plan remained in effect even though the pension agreement expired. Article III, section 3 of the Plan provided: "Termination of this Agreement shall not have the effect of automatically terminating the Plan. In the event of termination of this Agreement, . . . the Company may continue, amend, modify, suspend, or terminate the Plan by action of its Board of Directors . . ."

On August 8, 1974, the union went on strike. The Company hired strike replacements. It made contributions to the Plan (during the period of the strike) for the hours that employees worked before the strike, but it did not make contributions for the hours worked after the strike began. The Plan continued to pay employees benefits and to make lump sum distributions.

On December 30, 1974, the Board of Directors of the Company voted to suspend the Company's contributions to the trust, but it did not terminate the Plan. The Company did not notify the Plan's trustee that the payments had been suspended.

On April 1, 1975, the Company notified the Department of Labor and the Pension Benefit Guaranty Corporation (PBGC) that it had decided to terminate the Plan. Between April 1975 and November 1976, the Company and the UAW conferred with the PBGC regarding the coverage of the Plan under the plan termination insurance program. If the Plan was covered by the plan termination insurance program the PBGC would pay the Plan participants those guaranteed benefits which the Plan could not provide. 29 U.S.C. §§ 1322, 1342(d)(1)(B). Then, the PBGC would be authorized to seek reimbursement from Concord Control. 29 U.S.C. §§ 1362, 1368. The PBGC determined that as of April, 1975, the Plan provided for guaranteed benefits

of about $1,105,000; the plan assets were valued at $280,000 on that date.

On August 24, 1976, the PBGC rejected the Company's contention that the Plan was exempt from the plan termination insurance program because the Plan did not provide for employer contributions at any time after September 2, 1974 (the effective date of Title IV of ERISA). 29 U.S.C. § 1321(b)(5). The PBGC also rejected the Company's assertion that the Plan was exempt because it was an individual account plan. 29 U.S.C. § 1321 (b)(1).

On December 10, 1976, the Company filed a complaint in the district court seeking a declaratory judgment that the Plan was not covered by the plan termination insurance program. It also contended that the Plan's benefits were not guaranteed under the plan termination insurance program, and that Title IV of ERISA was unconstitutional. On June 13, 1977, the PBGC applied to the district court for an order terminating the Plan pursuant to section 4042 of ERISA. 29 U.S.C. § 1342. The district court consolidated the actions and the UAW and the Plan's trustee intervened. The parties stipulated to the facts and the case was tried on the merits. The district court held that the Plan did not "provide for" employer contributions after the effective date of ERISA and that it was exempt from the plan termination insurance program under section 4021(b)(5) of ERISA, 29 U.S.C. § 1321(b)(5).

II.

In this appeal, the PBGC contends that the district court erred when it held that the Plan was exempt from coverage under the plan termination insurance coverage because it did not "provide for" employer contributions at any time after the effective date of ERISA. We agree.

Section 4021(b)(5) of ERISA, 29 U.S.C. § 1321(b)(5), provides that pension plans are excluded from plan termination in-

surance coverage if they have "not at any time after September 2, 1974 *provided for* employer contributions." (emphasis added) Concord Control asserts that the Plan was exempt because the funding provisions of the Plan expired when the pension agreement expired in August 1974. This was prior to the effective date of Title IV of ERISA. Concord Control contends that the exemption applies because it was the funding provisions which "provided for" employer contributions.

The PBGC rejected this contention. Its letter to Concord Control stated "The legislative history of the Act is clear that Section 4021(b)(5) was intended to exempt only those plans that are based solely on employee contributions." The PBGC found that the Plan was not terminated before Title IV became effective, and that it was not entitled to the exemption. As a result, the PBGC concluded the Plan was covered by the plan termination insurance coverage.

The district court rejected the PBGC's determination and concluded that the Plan was exempt it [*sic*] did not "provide for" employer contributions at any time after the effective date of Title IV of ERISA. It held:

> The pension agreement and the Plan were expressly made severable by Article II, § 3. Since it was the pension agreement which "provided for" plaintiff's contributions, plaintiff's entire obligation in this respect expired with the agreement on August 8, 1974. 29 U.S.C. § 1321(b)(5) is not addressed to a fund already created; it is addressed to continuing employer contributions. In this case the Company's obligation ended prior to September 2, 1974 when the Collective Bargaining Agreement and the Pension Agreement expired.

The district court's conclusion that 29 U.S.C. § 1321(b)(5) "is addressed to continuing employer contributions" contradicts the PBGC's interpretation of the exemption: an interpretation based on the legislative history.

In construing this exemption "the determination of the PBGC . . . is entitled to great deference in the construction and application of ERISA." *Connolly* v. *Pension Benefit Guar. Corp.*, 581 F.2d 729 (9th Cir. 1978) *cert. denied* 440 U.S. 935 (1979). Although the legislative history of ERISA does not specifically address the exemption found at 29 U.S.C. § 1321(b)(5), it does discuss an identical exemption from ERISA's minimum funding rules. 29 U.S.C. §1081(a)(5). The legislative history explains "plans which have not provided for employer contributions at any time after the date of enactment are to be exempt from the minimum funding rules (i.e., plans of unions funded exclusively by contributions of the union members)." H.R. Rep. No. 93-1280, 93d Cong., 2d Sess. 291 (1974) *reprinted in* [1974] U.S. Code, Cong., and Ad. News, at p. 5072. The interpretation of this exclusion is consistent with the PBGC's interpretation of 29 U.S.C. §1321(b)(5). We find that interpretation persuasive.

In this case, the Plan "provided for" employer contributions. Article II, section 1 of the Plan provided specific amounts which the employer was to pay into the trust for each hour worked by participating employees and the Plan specifically provided that employees were not supposed to contribute to the Plan. This is not the type of plan 29 U.S.C. § 1321(b)(5) was intended to exempt. At the time Title IV of ERISA became effective the Plan "provided for" employer contributions within the meaning of 29 U.S.C. § 1321(b)(5). Concord Control cannot rely on this exemption.

Concord Control's contention that the Plan is an individual account plan which is excluded from coverage under the plan termination insurance program is without merit. 29 U.S.C. § 1321(b)(1).

An individual account plan is defined as:

> a pension plan which provides for *an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account,* and on income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account. (emphasis added) 29 U.S.C. § 1002(34)

The term "individual account plan" refers to plans in which each participant's retirement benefit is determined solely by reference to the amount accumulated in that participant's account. Termination insurance is not necessary for these plans because by their very definition each participant's benefit is dependent on the amount accumulated in his account.

The district court found that the Plan did not establish individual accounts and that the benefits paid "were not based solely upon the amount paid in for hours worked by a specific employee." This finding is supported by the record. The Plan determined participants' benefits by their years of service and their age and was not an individual account plan. *Connelly [sic]* v. *Pension Benefit Guar. Corp.*, 581 F.2d 729 (9th Cir. 1978) *cert. denied,* 440 U.S. 935 (1979).

Concord Control contends that the Plan's limitation of liability clause prevented the Plan's benefits from being characterized as "nonforfeitable." The PBGC only guarantees benefits characterized as "nonforfeitable." 29 U.S.C. § 1322(a). In *Nachman* v. *Pension Benefit Guar. Corp.*, 446 U.S. 459 [*sic*] (1980), the Supreme Court rejected the same contention and held that the term "nonforfeitable" was used in Title IV of ERISA "to describe benefits that were generally considered vested prior to the statute." 446 U.S. at 377, 378. The Court used the following definition of vested: "In essence, therefore, the vesting of a pension benefit simply means that the realization of the benefit is no longer contingent upon the individual's remaining in the service of the employer to normal retirement

age." 446 U.S. at 378 n. 27, *quoting*, D. McGill, Preservation of Pension Benefit Rights, 6 (1972). The benefits provided by the Plan had "vested." Neither the limitation of liability clause nor the Trustee's authority to adjust benefits prevents these benefits from being characterized as "nonforfeitable" under Title IV of ERISA. See also, *A-T-O, Inc.* v. *Pension Benefit Guar. Corp.*, 634 F.2d 1013, 1018-19 (6th Cir. 1980).

Finally, Concord Control contends that Title IV of ERISA is unconstitutional. This same contention was rejected in *A-T-O, Inc.* v. *Pension Benefit Guar. Corp.*, 634 F.2d 1013, 1024-26 (6th Cir. 1980). In that case we noted that Congress considered the retroactivity problem and determined that employer liability would only accrue after the enactment of ERISA. "[O]nly an act by an employer after the enactment of ERISA could trigger employer liability under § 1362." 634 F.2d at 1026. Concord Control did not terminate the Plan until after the effective date of Title IV of ERISA. The imposition of employer liability is constitutional.

REVERSED AND REMANDED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

No. C-1-76-567
No. C-1-77-316

(Consolidated)

Concord Control, Inc.,
Plaintiff,

v.

Pension Benefit Guaranty Corporation,
Defendant.

In re K D Lamp Company, et al.

Findings Of Fact, Opinion And Conclusions Of Law

(Filed February 27, 1978)

This matter is before the Court following submission of pretrial memoranda and the presentation of evidence and testimony. In accordance with Rule 52 of the Federal Rules of Civil Procedure, the Court does submit herewith its Findings of Fact and Conclusions of Law.

I

Findings Of Fact

1. This consolidated action arises from a complaint filed by plaintiff Concord Control, Inc. (hereinafter the "Company") in C-1-76-567 seeking a declaratory judgment that it may cause a certain pension plan to be terminated in accordance with its

terms, and its assets distributed, without the application of Title IV of the Employee Retirement Income Security Act of 1974 (hereinafter "ERISA"), 29 U.S.C. §1300 *et seq. [sic].*

2. Defendant-applicant, Pension Benefit Guaranty Corporation (hereinafter "PBGC") did not respond to the complaint of plaintiff, but on or about June 21, 1977, filed an application under 29 U.S.C. §1342 in Case C-1-77-316, seeking a decree of this Court terminating the pension plan, appointing a trustee, and ordering that the members of the Board of Administration appointed under the agreement creating the pension plan be required to show cause why the pension plan should not be terminated under 29 U.S.C. §1342.

3. By order of the Court dated July 13, 1977, the declaratory judgment action and the application of defendant were ordered consolidated, and the pleadings filed with respect to the application were ordered to be deemed adversary pleadings in the declaratory judgment action, to the extent appropriate.

4. Plaintiff Concord Control, Inc. is a Massachusetts corporation solely owned by one A. L. Stone. K.D. Lamp Co. is a division of Concord Control and operates a factory in Cincinnati, Ohio.

5. Defendant-applicant PBGC is an United States Government corporation established by the Employee Retirement Income Security Act of 1974 (ERISA).

6. Intervenor, The International Union, United Automobile, Aerospace and Agricultural Implement Workers and its Local 1258 (hereinafter jointly referred to as "Union"), has been since 1953 the bargaining agent of certain hourly employees of the Company in Cincinnati, Ohio.

7. On May 22, 1974, the Union advised the Company of its intention to terminate an existing collective bargaining contract sixty days thereafter (Joint Ex. VIII). Negotiations commenced

shortly thereafter without success. No subsequent collective bargaining agreement was ever adopted. On August 8, 1974, members of the bargaining unit went on strike. The company resumed operations with replacement employees, and as the strike continued, with striking employees who accepted the company's offer to return to work without a collective bargaining agreement.

8. In September of 1956 a pension agreement and plan (hereinafter the "Plan"), were established as a part of the collective bargaining agreement. The Plan was amended on five occasions, the most recent being January 1, 1972 (Joint Ex. I). Article II, §1 of such Plan as amended on January 1, 1972, provided for payment of a specific sum of money by the Company into the retirement fund for each hour worked by each employee. Such sum amounted to 29¢ per hour beginning June 8, 1971, and increased by specific increments to 41¢ per hour on and after December 8, 1973, until August 7, 1974.

9. Article II, §1, likewise set forth specifically the payment obligations of the parties to the retirement fund in the following terms:

> "No employee shall make or be required to make any payment to the retirement fund nor shall the Company be required to make any payments other than those specified in the preceding sentence to the retirement fund."

The phrase "preceding sentence" referred to the payment made based upon hours worked.

Section 2 of Article II permitted the Company to make additional payments in the following terms:

> "The Company may also make from time to time such additional payments as it in its sole discretion deems desirable . . ."

10. The Plan provided for benefits to retired employees expressed in a specific sum per month multiplied by the years of credited service. On the effective date of the Plan, employees were entitled to include past service as of that date. It was recognized by the parties that the obligation for past service credit would create a financial obligation upon the Plan greater than the initial ability to pay. Accordingly, it was intended that the per hour payment by the Company would gradually reduce the excess obligation and ultimately provide sufficient funds to pay the retirement benefits as they came due.

11. No individual account for each participant was ever established; and benefits were not based solely upon the amount paid in for hours worked by a specific employee. Income, expenses, gains and losses or forfeitures of accounts of other participants were not allocated to separate accounts.

12. Like many close-held corporations, Concord Control, Inc. was not operated with the formality associated with large public corporations. A board of directors did exist and it met from time to time during the period in question. Policy decisions were not made by the Board of Directors but were made instead by sole shareholder Stone. Such decisions were communicated to the operating officials of the company, the senior of whom were in fact members of the Board. Conferences of such officials tended to be informal, and although decisions of an administrative nature had the effect of declarations of the Board, they were frequently not made matters of corporation minutes until some time later; and in some circumstances, never made the subject of corporate minutes at all.

13. Article XII, §3, of the Plan provided that:

> "Termination of this Agreement shall not have the effects of automatically terminating the Plan. In the event of termination of the Agreement . . . , the Company may continue, amend, modify, suspend or terminate the Plan by action of its Board of Directors; . . ."

14. On December 30, 1974, the minutes of the Board of Directors (Joint Ex. XXV) contained the following:

> "The Board of Directors voted to suspend, effective August 8, 1974, the Company contributions to the K D Lamp retirement trust . . . The suspension is not a termination of the Plan and is not to be viewed by anyone as a termination of the Plan . . ."

On April 1, 1975, a letter was sent to the Secretary of Labor with a copy to the PBGC (Joint Ex. XXVI). In this letter the Company indicated an intention to terminate the employer's contributions to the Plan "on or about April 1, 1975." The letter was signed by Richard Vogele, Secretary and Comptroller of the Company. The letter purports to be notification "on behalf of K D Lamp Company and Local 1258, the Plan Administrators." Evidence was presented of an informal Board of Directors meeting approving such letter; but no approval or agreement of any sort was ever obtained from Local 1258.

Minutes of a meeting of the Board of Directors of December 30, 1975 (Joint Ex. LXI) contain statements that the Plan was terminated April 1, 1975. Other than the letter of April 1st and the corporate minutes of December 30th, no evidence of any action terminating the Plan was presented to the Court. Under the circumstances above described, however, this was sufficient action by the Company to terminate the Plan.

15. On August 7, 1974, at the commencement of the strike, Lee Siler, Manufacturing Manager of the Company, mailed a letter to all striking employees (Joint Ex. XLVI). In this letter is contained a "memorandum of operating procedure" with the following terms:

> "Strikers who wish to return to work and claim their seniority and all their benefits have a legal right to do so without interference . . . as employees who report for work will receive the wage rates and fringe benefits contained in the expired contract."

In the same memorandum, Mr. Siler referred to persons employed to take the place of the strikers. His letter contained the following reference: "Persons hired as permanent strike replacements will also be entitled to these wage and fringe benefits." In view of the existence of the Plan since 1956, it is clear that it was included in the phrase, "fringe benefits." On August 11 and 12, 1974, the Company advertised in the Cincinnati Enquirer for replacement employees (Joint Exhibit XLVIII and Joint Exhibit LII). In each of these advertisements under the heading of "Good Working Conditions" is included the following: "Disability Benefits — Pension — . . ."

Despite the foregoing, replacement workers were not included in pension coverage (Testimony of F. O. Luerck, Personnel Manager) and no contributions were ever made to the pension fund for hours worked by replacement employees. (Joint Ex. XXV).

OPINION

There are four legal issues presented for resolution:

1. Whether the Plan "has not at any time after September 2, 1974, provided for employer contributions," within the meaning of 29 U.S.C. §1321(b)(5);

2. Whether the Plan is an "individual account plan" under 29 U.S.C. §132(b)(1) and (12) *[sic]*;

3. Whether the benefits of participants under the Plan are "non-forfeitable" benefits guaranteed by defendant-applicant under 29 U.S.C. §1332(a) *[sic]*; and

4. Whether Title IV of ERISA, if applied to plaintiff under the circumstances of this case, is unconstitutional under the Fifth Amendment to the United States Constitution.

Since the Court has determined that the Plan did not at any time after the effective date of ERISA, i.e., September 2, 1974, provide for employer contributions, this deposition obviates the necessity of considering issues two, three and four.

29 U.S.C. §1321(b)(5) exempts from ERISA compliance any plan "which has not at any time after September 2, 1974, provided for employer contributions." Plaintiff asserts that since the pension agreement, and therefore K D Lamp Company's obligation to make payment to the Plan, expired on August 7, 1974, the Plan did not "provide for" contributions beyond that date, and is thus exempt.

Defendant-applicant and intervenor argue that even if that obligation terminated (although they contend that it did not), the continued existence of the Plan beyond September 2, 1974, was alone sufficient to "provide for" employer contributions.

The pension agreement stated in Article XII, §3, that termination of the agreement did not automatically terminate the Plan. Plaintiff recognized the continued existence of the Plan on December 14, 1974 (Joint Exhibit XLIX), and specifically noted in the minutes of the December 30, 1974, Board of Directors meeting that suspension of contributions was not to be construed as a termination of the Plan. Indeed, plaintiff makes no claim that Plan termination occurred prior to April 1, 1975.

The continued existence of the Plan, however, imposed no requirement upon plaintiff to contribute to the pension fund for hours worked after August 7, 1974. The pension agreement and the Plan were expressly made severable by Article XII, §3. Since it was the pension agreement which "provided for" plaintiff's contributions, plaintiff's entire obligation in this respect expired with the agreement on August 8, 1974. 29 U.S.C. §1321(b)(5) is not addressed to a fund already created; it is addressed to continuing employer contributions. In this case the Company's obligation ended prior to September 2, 1974 when the Collective Bargaining Agreement and Pension Agreement expired.

To accept defendant-applicant's position would be to reach the untenable conclusion that although the contractual obligation to contribute to the fund had lapsed, the continued existence of the fund beyond September 2, 1974, in and of itself, imposed an extracontractual duty upon plaintiff, performance of which is secured by ERISA.

Similarly, intervenor's assertion that plaintiff was obligated to contribute to the fund on behalf of strike replacements after August 7, 1974, can only be sustained if the Court ignores the fact that the collective bargaining agreement also expired on that date.

Article I, §2, of the pension agreement defined the term, "employee," as:

> . . . *any person* who, at the time referred to in the context in which the said term is used, is *on the seniority list* of the Company *in the bargaining unit as defined in the collective bargaining agreement then in effect* between the Company and the Union. (emphasis added)

After August 7, 1974, however, there was no collective bargaining agreement in effect between plaintiff and the Union. Consequently, the strike replacements were not persons in a bargaining unit as "defined" in any such agreement.

CONCLUSIONS OF LAW

A. This Court has jurisdiction under 29 U.S.C. §1303(e) and 28 U.S.C. §1331.

B. Where an employer's contributions to a plan are defined only in a Pension Agreement that terminated prior to September 2, 1974, such plan is exempted from ERISA compliance by 29 U.S.C. §1321(b)(5).

C. Defendant-Applicant is without jurisdiction over such Plan under Title IV of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1301 *et seq.*

D. Judgment is hereby entered for plaintiff and against Defendant-Applicant in Civil No. C-1-76-567.

E. Defendant-Applicant's application for a decree of termination in Civil No. C-1-77-316 is hereby DISMISSED.

LET JUDGMENT ISSUE IN ACCORDANCE WITH THE FOREGOING.

/s/ Carl B. Rubin
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF OHIO - WESTERN DIV.

Civil Action File No. C-1-76-567
C-1-77-316

Concord Control Inc.

vs.

Pension Benefit Guaranty Co.
(In re K D Lamp Co., et al)

JUDGMENT

(Filed February 27, 1978)

This action came on for trial before the Court, Honorable Carl B. Rubin, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged that judgment should be and is hereby found for the plaintiff and against the defendant in Case number C-1-76-567. In case number C-1-77-316, defendant-applicants' application for a decree of termination should be and is hereby dismissed.

Dated at Cincinnati, Ohio, this 27th day of February, 1978

JOHN D. LYTER
Clerk of Court

/s/ Anne Catanzaro
Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 78-3252/3/4

Concord Control, Inc.,
Plaintiff-Appellee,

vs.

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW),
Intervenor-Defendant-Appellant (78-3252),

and

Pension Benefit Guaranty Corporation,
Defendant-Appellant (78-3253/4)

Before: MERRITT, BROWN and JONES, Circuit Judges.

JUDGMENT

(Filed May 6, 1981)

APPEAL from the United States District Court for the Southern District of Ohio, Western Division.

THIS CAUSE came on to be heard on the record from the United States District Court for the Southern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and case remanded.

It is further ordered that Appellants recover from the Appellee the costs on appeal as itemized below, and that execution therefor issue out of said District Court, if necessary.

ENTERED BY ORDER OF THE COURT
JOHN P. HEHMAN, CLERK

/s/ Leonard Green
Chief Deputy Clerk

Issued as Mandate: September 4, 1981 A True Copy.

COSTS: (Costs to be recovered by appellant)

Filing fee	$ 50.00
Printing	$ 26.33
Total	$ 76.33

Attest:

/s/ Gary McCarthy
Deputy Clerk

NOS. 78-3252, 78-3253, 78-3254
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Concord Control, Inc.,
Plaintiff-Appellee,

v.

Pension Benefit Guaranty Corporation

and

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW),
Defendant-Appellant.

ORDER

(Filed June 24, 1981)

BEFORE: MERRITT, BROWN and JONES, Circuit Judges.

Upon consideration, the Court concludes that the issues raised in the petition for rehearing were fully considered upon the original submission and decision of the appeal. Accordingly, the petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

Opposition

1

Office-Supreme Court, U.S.
FILED
OCT 22 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-579

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CONCORD INSTRUMENTS CORPORATION,
Petitioner,

v.

PENSION BENEFIT GUARANTY CORPORATION,

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW) and its LOCAL 1258, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF IN OPPOSITION FOR UAW & ITS LOCAL 1258, *ET AL.*

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

COUNTERSTATEMENT OF QUESTIONS PRESENTED

I

Whether, after September 2, 1974, the K-D Lamp Co. and Local 1258, *etc.*, Pension Plan "provided for" employer contributions within the meaning of § 4021(b)(5) of ERISA,* 29 U.S.C. § 1321(b)(5)?

II

Whether a plan provision that limits otherwise defined, vested benefits to amounts that can be provided by the assets of the pension fund prevents such benefits from being characterized as "nonforfeitable" within the meaning of § 4022(a) of ERISA, 29 U.S.C. § 1322, and thus subject to guaranty?

III

Whether the application of the employer liability provisions of Title IV of ERISA to a pension plan terminated after September 2, 1974, violates due process under the Fifth Amendment?

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* Employee Retirement Income Security Act of 1974, hereafter ERISA, 29 U.S.C. § 1001, *et seq.*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-579

CONCORD INSTRUMENTS CORPORATION,
Petitioner,

v.

PENSION BENEFIT GUARANTY CORPORATION,

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW) and its LOCAL 1258, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF IN OPPOSITION FOR UAW & ITS LOCAL 1258, *ET AL.*

The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), and its Local 1258, *et al.*,[1] by counsel, respectfully pray that the Court *deny* the Petition for Writ of *Certiorari*.

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[1] Hereafter, jointly referred to as the "UAW" or "Union." Messrs. Remley and Flohr, plan participants and the UAW's members of the plan's Board of Administration are also parties, and, unless otherwise indicated, should be included in such a reference.

OPINIONS BELOW

The opinion is reported at: *Concord Control, Inc. v. UAW & PBGC*, 647 F.2d 701 (6th Cir. 1981), *reversing & remanding* —— F. Supp. —— (S.D. Oh. 1978), unreported.[2]

COUNTERSTATEMENT OF THE CASE

Petitioner's division K-D Lamp Co. operated a factory in Cincinnati, Ohio. A defined benefit pension plan [3] was established in 1956, and continued with various amendments. The Plan was non-contributory:

> No employee shall make or be required to make any payment to the retirement fund nor shall the Company be required to make any payments other than those specified in the preceding sentence to the retirement fund. (A-11)

Under Article II § 2 of the Plan, the Company was permitted to make payments over the normal cents-per-hour requirements:

> The Company may also make from time to time such additional payments as it in its sole discretion deems desirable . . . (A-11)

At the expiration of the labor agreement on August 7, 1974, the UAW went on strike. K-D Lamp hired strike replacements, advertising "Good Working Conditions" including "Disability Benefits—Pension— . . ." [4] The Plan continued to pay employees benefits and to make lump sum distributions.

The Plan itself remained in effect even though the labor agreement had expired Article III § 3 of the Plan provided:

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[2] Both are reprinted in the Appendix to the Petitioner, which will be cited "A-11."

[3] Trial Court's Finding of Fact Nos. 10 & 11, A-12.

[4] Trial Court's Finding of Fact No. 15, A-14.

> Termination of this Agreement shall not have the effect of automatically terminating the Plan. In the event of termination of this Agreement . . . the Company may continue, amend, modify, suspend, or terminate the Plan by action of its Board of Directors. . . . (A-3; A-12)

On September 2, 1974, Title IV of the Employee Retirement Income Security Act (ERISA) went into effect, 29 U.S.C. § 1461(a). On December 30, 1974, the employer's Board of Directors passed a resolution which suspended Company pension contributions *retroactively* to August 8, 1974. However, termination of the Plan was expressly disclaimed. The Plan was not terminated until April 1, 1975, with a letter to that effect, addressed to the Secretary of Labor.[5] Thus, the Plan continued until April 1, 1975, well after the September 4, 1974, effective date of Title IV.

The Pension Benefit Guaranty Corporation (PBGC) determined that the Plan was covered by the guaranty provisions of § 4022 of ERISA, 29 U.S.C. § 1322. Concord Control, Inc., sued for a determination that the benefits could not be guaranteed. The UAW and its Local intervened to support PBGC.

After trial, the District Court found that, despite the Plan's continuation until April 1, 1975, the exemption of § 4021(b)(5), 29 U.S.C. § 1321(b)(5), precluded coverage. It rejected the PBGC reading of that provision. On appeal, the Sixth Circuit reversed. It agreed with the PBGC's reading of § 4021(b)(5) as intended to exclude an entirely *different* sort of pension arrangement, *i.e.*, plans whose funding is based *solely* on *employee* contributions. Both PBGC and the Circuit rested on the legislative history. A-5 & A-6. The Circuit went on to the remaining issues, which the District Court did not reach. It held that there was no "individual accounts" so that

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[5] Trial Court's Finding of Fact No. 14, A-13.

exemption, § 4021(b)(1), 29 U.S.C. § 1321(b)(1), did not apply. A-6 & A-7. Since, under *Nachman Corp. v. PBGC & UAW*, 446 U.S. 359 (1980), the benefits in question were "vested", the Circuit rejected Concord Control's revisitation of that argument. A-7 & A-8. Finally, the Circuit held Title IV constitutional, as Concord Control did not terminate the Plan until *after* the effective date of Title IV of ERISA. A-8.

ARGUMENT

The writ should be denied. The "provided for" issue, § 4021(b)(5), 29 U.S.C. § 1321(b)(5), is minor, transitional, and fact-specific. The *Nachman* issue has already been decided by this Court, leaving only arguments, like that advanced here, about its application to this or that piece of language. The First, Third, Sixth, and Seventh Circuits agree that Title IV is constitutional. No Circuit has come to the other conclusion.

I

The Circuit's and PBGC's reading of the "provided for" exemption of § 4021(b)(5), 29 U.S.C. § 1321(b)(5), sensibly excludes plans funded solely by *employee* contributions. Congress did not intend that employers be liable for, of that PBGC guaranty that sort of arrangement. The reading does *not* exclude what we are dealing with here—an employer-funded *defined benefit* pension, which the employer chose to terminate seven (7) months *after* the Act, making a self-serving, *retroactive* attempt to disclaim the need for contributions.

This issue has, as far as we can determine, *only* arisen in the instant case. It is passing and transitional, arising only in the sort of situation presented here. If it were not, the seven years since the passage of ERISA would certainly have produced specific examples, rather than the general assertions found in the Petition, *see* p. 7. Once the transitional period has passed, as it has now, the issue will not occur.

Even if it did, PBGC's reading is correct. Concord Control could have terminated the Plan before the effective date of the Act, but did not. Concord Control's interpretation of "provided for" would expose Title IV, and the courts, to renewed attempts to draft around ERISA by simply avoiding *contractual* provision for funding. This would, *e.g.*, threaten the coverage of unilateral pension plans, promulgated by employers in non-union situations. PBGC's and the Circuit's reading of § 4021 (b) (5) is considerably more restrained and consistent with the remedial intent of the legislation.

II

The Court has already been through *Nachman Corp. v. PBGC & UAW*, 446 U.S. 359 (1980), and there is no need to revisit it. Concord Control asks the Court to pronounce its and, by implication, every litigant's particular variation of plan language. This blessing is best left to the trial courts and, where necessary, the Circuits. The Circuits have, thus far, had no difficulty dealing with it. *A-T-O v. PBGC*, 634 F.2d 1013 (6th Cir. 1980); *In the Matter of Defoe Shipbuilding Co., etc., Pension Plan*, 639 F.2d 311 (6th Cir. 1981); *Lear Siegler v. PBGC & UAW*, —— F.2d —— (6th Cir. 1981); *In the Matter of Williamsport Milk Co., etc., Pension Plan*, 631 F.2d 726 (3d Cir. 1980) (table), *affirming*, —— F. Supp. —— (M.D. Pa. 1978), 206 BPR D-15; *PBGC v. Ouimet Corp.*, 630 F.2d 4 (1st Cir. 1980), *cert. denied*, —— U.S. —— (1981), 67 L. Ed. 2d 339, 101 S. Ct. 1356; and, of course, *Nachman Corp. v. PBGC & UAW*, 592 F.2d 947 (7th Cir. 1979).

III

The first Circuit to address the issue held Title IV constitutional. *Nachman Corp. v. PBGC & UAW*, 592 F.2d 947, 958-963 (7th Cir. 1979). This Court limited its grant, and did *not* take the Fifth Amendment issue.

Since then, the First, Third and Sixth Circuits have all agreed with the Seventh. *PBGC v. Ouimet Corp.*, 630 F.2d 4, 12-13 (1st Cir. 1980), *cert. denied*, —— U.S. —— (1981), 67 L. Ed 2d 339, 101 S. Ct. 1356; *In the Matter of Williamsport Milk Co., etc., Pension Plan*, 631 F.2d 726 (3d Cir. 1980) (table), *affirming*, —— F. Supp. —— (M.D. Pa. 1978), 206 BPR D-15, D-18 & D-19; *A-T-O v. PBGC*, 634 F.2d 1013, 1024-26 (6th Cir. 1980); *Lear Siegler v. PBGC & UAW*, —— F.2d —— (6th Cir. 1981); and the instant case, 647 F.2d 701, 705 (6th Cir. 1981).

Should the Circuits split, this Court will have ample opportunity to get into the constitutional issues. There is no present need to seek out constitutional issues, as Petitioner urges.

CONCLUSION

For the foregoing reasons, we respectfully urge the Court *to deny* the writ.

Respectfully submitted,

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October 22, 1981.

Opposition

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Office-Supreme Court, U.S.
FILED
OCT 23 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-579

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CONCORD INSTRUMENTS CORPORATION,
Petitioner,

v.

PENSION BENEFIT GUARANTY CORPORATION and INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW),
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE PENSION BENEFIT GUARANTY CORPORATION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court of Appeals properly determined that the employer's pension plan "provided for" employer contributions, within the meaning of Section 4021(b)(5) of the Employee Retirement Income Security Act of 1974 ("ERISA") where the plan did not terminate until after ERISA became effective.

2. Whether the Court of Appeals properly determined that plan benefits were "nonforfeitable" within the meaning of Section 4022(a) of ERISA as defined by this Court's decision in *Nachman Corp.* v. *PBGC*, 446 U.S. 359 (1980).

3. Whether the Court of Appeals properly determined that the application of employer liability provisions in Title IV of ERISA do not violate the due process clause of the Fifth Amendment.

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Act of Congress Cited:

Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.* (1976), *as amended by* Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208 (1980),
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-579

CONCORD INSTRUMENTS CORPORATION,
Petitioner,

v.

PENSION BENEFIT GUARANTY CORPORATION and INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW),
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF THE PENSION BENEFIT GUARANTY CORPORATION IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 647 F.2d 701 and reproduced in Appendix A to the Petition for the Writ of Certiorari ("App. A."). The opinion of the District Court for the Southern District of Ohio is unreported; it is reproduced in Appendix B to the Petition ("App. B").

JURISDICTION

The judgment of the Court of Appeals was entered on May 6, 1981. Petition for rehearing was denied on June 24, 1981. The Petition for a Writ of Certiorari was filed on September 22, 1981. The jurisdiction of this Court is founded upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The relevant provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001, *et seq.* (1976), *as amended by* Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208 (1980), and of the Constitution are set forth in the Petition (App. A. at A-2, 3).

STATEMENT

Petitioner, Concord Instruments Corporation, is the successor to the K-D Lamp Company. Respondent Pension Benefit Guaranty Corporation (the "PBGC") is a wholly-owned United States Government corporation established under Title IV of ERISA to administer a program of pension plan termination insurance. The PBGC guarantees payment of pension benefits in defined benefit pension plans that terminate with insufficient funds to pay basic pension benefits. 29 U.S.C. §§ 1321 and 1322.

In 1956, the K-D Lamp Company, and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (the "UAW") entered into a pension agreement, establishing a pension plan (the "Plan"), and creating a trust to hold the Plan assets. In 1966, Petitioner purchased the K-D Lamp Company, which has been operated as a division of Petitioner since that time.

On January 1, 1972, the Petitioner and the UAW signed a pension agreement, amending the terms of the

Plan and restating the Plan in full.[1] The Plan did not provide for employee contributions. Indeed, the Plan benefits were provided solely by employer contributions made for each hour worked by each participating employee.

In June of 1974, the UAW and the Petitioner began negotiations for a new collective bargaining agreement and a new pension agreement, but the negotiations were unsuccessful. On August 7, 1974, the pension agreement expired. On August 8, 1974, the collective bargaining agreement expired. The Plan, however, remained in effect, continuing to operate: monthly benefits continued to be paid to participants already in pay status; participants, becoming eligible to receive benefits, were put into pay status or were paid lump sums pursuant to the Plan's provisions.

On November 29, 1974, and January 24, 1975, the Plan administrator submitted premium payments to the PBGC for the Plan years ending December 31, 1974, and December 31, 1975. The Premium Payment Declaration Forms, signed by the Company's treasurer, stated that the Plan was "[i]ncluded in coverage" under the plan termination insurance program established by Title IV of ERISA.

On December 30, 1974, the Board of Directors of the Petitioner expressly resolved to suspend contributions to the trust without terminating the Plan. The Petitioner did not notify the Plan's trustee that the contributions had been suspended. Finally, the Petitioner voluntarily terminated the Plan on April 1, 1975.

From April 1975 until late 1976, Petitioner and the UAW conferred with the PBGC regarding the coverage of the Plan under the plan termination insurance program. If the Plan were covered by the plan termination

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[1] The terms of the Plan and the terms of the pension agreement are the same. They are stated in a single document. As defined in that document, " 'Plan' means this Company-Union agreement . . . ." There is also a separate collective bargaining agreement that contains non-pension terms of employment.

insurance program, the PBGC would pay the Plan participants those guaranteed benefits which the Plan could not provide due to inadequate assets. 29 U.S.C. §§ 1322, 1342(d)(1)(B). The Petitioner claimed that the Plan was exempt from coverage on the ground that the Plan allegedly did not provide for employer contributions at any time after September 2, 1974 (the effective date of Title IV of ERISA). 29 U.S.C. § 1321(b)(5). In August of 1976, the PBGC rejected the Petitioner's contention.

On December 10, 1976, the Petitioner filed a complaint in the district court seeking, *inter alia*, a declaratory judgment that the Plan was not covered by the plan termination insurance program. On June 13, 1977, the PBGC applied to the district court for an order terminating the Plan pursuant to section 4042 of ERISA. 29 U.S.C. § 1342. The district court held that the Plan did not "provide for" employer contributions after the effective date of ERISA and that it was exempt from the plan termination insurance program under section 4021(b)(5) of ERISA, 29 U.S.C. § 1321(b)(5). (App. A at A-4.)

The Court of Appeals reversed. It concluded (App. A at A-6):

> In this case, the Plan "provided for" employer contributions. Article II, section 1 of the Plan provided specific amounts which the employer was to pay into the trust for each hour worked by participating employees and the Plan specifically provided that employees were not supposed to contribute to the Plan. This is not the type of plan 29 U.S.C. § 1321(b)(5) was intended to exempt. At the time Title IV of ERISA became effective the Plan "provided for" employer contributions within the meaning of 29 U.S.C. § 1321(b)(5). Concord Control cannot rely on this exemption.

The Court of Appeals also considered and rejected the other contentions of the Petitioner:

(a) Relying on *Connolly* v. *PBGC*, 581 F.2d 729 (9th Cir. 1978), *cert. denied*, 440 U.S. 935 (1979), the Court

concluded that the Plan is not an individual account plan which is excluded from coverage under the plan termination insurance program (App. A at A-6, 7).

(b) Based on this Court's decision in *Nachman Corp.* v. *PBGC*, 446 U.S. 359 (1980), the Court concluded that the Plan's limitation of liability clause did not prevent the Plan's benefits from being characterized as "non-forfeitable" (App. A at A-7, 8).

(c) Based on its own decision in *A-T-O, Inc.* v. *PBGC*, 634 F.2d 1013 (6th Cir. 1980), and consistent with decisions in the only three other United States Circuit Courts of Appeals to have addressed the issue, the Court found no taking without due process as a result of the imposition of employer liability under Title IV of ERISA (App. A at A-8).

REASONS FOR DENYING THE WRIT

1. The first question which Petitioner seeks to raise is whether a pension plan, which did not terminate until after the effective date of ERISA, is nevertheless exempt from plan termination insurance coverage because it allegedly did not "provide for" employer contributions after September 2, 1974. This Court should decline to grant certiorari with regard to an issue about which Petitioner asserts: "To our knowledge, this is the only case now in litigation that presents a § 1321(b)(5) issue (which, by its very nature, should be quite rare)." (Petitioner's Brief on Appeal at 3; *see, Id.* at 8, 9, 12, 23, 49.) The Court of Appeals, by carefully reasoned analysis, rejected Petitioner's contention and determined that "the Plan 'provided for' employer contributions within the meaning of 29 U.S.C. § 1321(b)(5)" and, therefore, was not exempt from coverage under the termination insurance program. The Court of Appeals properly concluded that the § 1321(b)(5) exemption was limited to those plans based solely on employee contributions, a condition clearly not present in the case at bar. Moreover, it is equally clear that Petitioner

continued to contribute under the Plan,[2] which it considered to be covered by the PBGC, subsequent to the effective date of ERISA. Therefore, by its terms, the § 1321(b)(5) exemption is inapplicable to the Plan.[3]

This Court has long recognized that exemptions to remedial legislation are to be narrowly construed. *A.H. Phillips, Inc.* v. *Walling*, 324 U.S. 490 (1945). In interpreting the language and describing the scope of the § 1321(b)(5) ERISA exemption, the Court of Appeals examined the applicable legislative history and gave appropriate deference to the statutory interpretation espoused by the administering agency, the PBGC. In so doing, the Court of Appeals followed in the fresh footsteps of this Court. *See, Nachman Corp.* v. *PBGC*, 446 U.S. at 373-382.

2. Petitioner's next contention amounts to no more than an attempt to seek review of this Court's recent *Nachman* decision regarding the definition of "nonforfeitable" for purposes of Title IV of ERISA. *Nachman Corp.* v. *PBGC*, 446 U.S. 359 (1980). Petitioner now considers the issue and the Plan in the instant case as clearly distinguishable from *Nachman*. Yet, the Petition can hide neither Petitioner's previous assertion to this Court in its brief as *amicus curiae* in *Nachman* that "the issue raised in the instant [*Nachman*] case is squarely applicable to amicus, and its disposition will vitally affect the [Petitioner's] appeal now pending in the Sixth Circuit," nor Petitioner's assertion to the Court of Appeals that the Plan is "virtually identical to . . . *Nachman* . . . on this point [of nonforfeitability]." The

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[2] Contributions made after September 2, 1974, were for hours worked prior to the expiration of the pension agreement.

[3] Petitioner seeks to focus the Court's attention on an issue which is not before the Court—the Court of Appeals' "*holding* that this exemption [§ 1321(b)(5)] merely covers labor union plans" (emphasis added) (App. A at A-10). The short answer to this contention is that the Court of Appeals' decision contains no such holding and is, instead, a well-reasoned-textual analysis of the statute, its exemptions and its legislative history.

PBGC argued and the Court of Appeals held that this Court's decision in *Nachman* disposed of the "nonforfeitability" issue.

3. Petitioner's final contention is a due process challenge to employer liability for plan asset insufficiency under 29 U.S.C. §§ 1362, 1368. There is no reason to review the Court of Appeals decision on substantially the same constitutional challenge which has been rejected by every appellate court to have considered the issue. *A-T-O, Inc.* v. *PBGC*, 634 F.2d 1013 (6th Cir. 1980); *In re Williamsport Milk Products Co., Inc. Retirement Plan for Salaried Employees*, 631 F.2d 726 (3d Cir. 1980); *PBGC* v. *Ouimet Corp.*, 630 F.2d 4 (1st Cir. 1980); *Nachman Corp.* v. *PBGC*, 592 F.2d 947 (7th Cir. 1979), *aff'd on other grounds*, 446 U.S. 359 (1980). Moreover, the constitutional issue was specifically excluded by this Court from its grant of certiorari in *Nachman Corp.* v. *PBGC*, 442 U.S. 940 (1979). This issue still does not deserve review.

The Petitioner asserts that it received no "*quid pro quo*" from its continuation of the Plan subsequent to the effective date of ERISA. (App. A at A-14.) However, the court below, unlike the Petitioner, recognized that the amount of each pension benefit, as calculated under the Plan, is a direct function of the service already rendered to the Petitioner by the applicable employees. The Petitioner was free to continue the Plan, freeze benefit accruals, and fund those frozen benefits over forty years. Petitioner, however, voluntarily chose to terminate its Plan and submit itself to the liability provisions of Title IV of ERISA.

Petitioner asserts that the Court of Appeals did not give due regard to this Court's decisions in *Allied Structural Steel Co.* v. *Spannaus*, 436 U.S. 943 (1978) and *Railroad Retirement Board* v. *Alton Railroad Co.*, 295 U.S. 330 (1935). The Court of Appeals had only recently exhaustively analyzed the principles enunciated in those cases, as well as *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). In *A-T-O, Inc.* v. *PBGC*,

634 F.2d 1013, 1024-1026 (6th Cir. 1980), the Court of Appeals concluded that the imposition of employer liability under Title IV of ERISA does not deprive an employer of due process. *A-T-O, Inc.* v. *PBGC*, 634 F.2d at 1026. In the instant case, the Court of Appeals followed that recent decision. Like each of its sister Courts of Appeals which has considered the issue, the Court found no infirmity in ERISA's requirement that employers, in effect, pay for pension benefits they promise; nor should this Court.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

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